PREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969.

No. 427

DEFIANCE INDUSTRIES, INC.
and B.S.F. COMPANY,

Petitioners,

and

ROBERT H. HUFFINES, JR., EDWARD KROCK
and VICTOR MUSCAT

v.

DEBORAH TANZER and WILLIAM PRICKETT,
RECEIVER PENDENTE LITE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Defiance Industries, Inc. ("Defiance") and B.S.F. Company ("B.S.F.") pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment in this case.

OPINIONS BELOW.

The opinion of the Court of Appeals, set forth in Appendix A, A-1 to A-4, *infra,* is not reported. The United States District Court for the District of Delaware rendered no opinion.

JURISDICTION.

The judgment of the Court of Appeals, set forth in Appendix B, A-5 to A-6, *infra*, was entered June 10, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Under 28 U. S. C. § 2001 a federal court may not confirm a private judicial sale of realty unless it first orders appraisal of the property and publication of the terms of sale at least ten days before confirmation. Under 28 U. S. C. § 2004 a federal court must follow the same procedure before confirming a judicial sale of personalty "unless the court orders otherwise". The question presented is:

> Whether a federal court, under 28 U. S. C. § 2004 and consistent with the Due Process Clause of Amendment V to the United States Constitution, has discretion to confirm a private judicial sale of corporate stock having no readily ascertainable market value, in the custody of a Receiver pendente lite, without first requiring an appraisal of the stock and publication of the terms of sale, and without providing in advance for orderly bidding?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Amendment V to the United States Constitution pertinently provides that no person shall "be deprived of . . . property without due process of law." Relevant provisions of the Federal Judicial Sales Act, 27 Stat. 741, as amended, 28 U. S. C. §§ 2001 and 2004, are set forth in Appendix C, A-7 to A-8, *infra*.

STATEMENT OF THE CASE.

On December 24, 1968, the United States District Court for the District of Delaware ("District Court") ordered a sale of 146,228 shares of American Steel and Pump Corporation ("A.S.P.")[1] to David Morgan and Carl Glickman ("Morgan-Glickman") for $3,550,000 or $24.27 per share (395a-402a).[2] What is crucial is the manner in which this sale was allowed to occur.

The basic facts are undisputed. Petitioner B.S.F., a Delaware corporation, owned the 47% interest in A.S.P. which was sold (94a, 98a). Petitioner Defiance, an Ohio corporation, is B.S.F.'s principal (32%) stockholder. Respondent Deborah Tanzer is a B.S.F. shareholder who in March, 1966 filed a derivative action on behalf of B.S.F. in the District Court. As a result of that derivative litigation, respondent William Prickett was appointed Receiver pendente lite for B.S.F. on July 12, 1968 (3a-10a).

At the time of the Receiver's appointment, B.S.F. had overdue bank loans, other debts, and certain outstanding debentures which would fall due in December, 1969. Since B.S.F. had no cash with which to meet these obligations, the Receiver decided to sell B.S.F.'s 47% interest in A.S.P., even though he was merely a Receiver pendente lite and the case itself had not yet been tried (12a-23a; 95a-200a).

On December 5, 1968, the Receiver, *without prior consultation with the District Court or notice to B.S.F. shareholders,* entered into a private contract with The Seagrave Corporation ("Seagrave") to sell the A.S.P. shares for $20.25 per share, subject to court approval by December 24, 1968 (24a-34a; 127a-128a). The Seagrave offer was

1. Representing a 47% interest in A.S.P.

2. References to "(. . . a)" are to the pages of the Appendix to the Briefs filed with the Court of Appeals and included in the record certified by the clerk of that Court being filed with this petition.

one of four offers which had been made to the Receiver since October, 1968 (17a-23a; 123a-128a). Although the Receiver considered the Seagrave offer the best, he admitted that he had never canvassed the market or in any other manner actively solicited offers for the A.S.P. stock (122a-123a; 143a-144a).[3]

Nonetheless, on December 10, 1968 the Receiver presented the Seagrave offer to the District Court for approval (11a). Because the Seagrave contract was expressly conditioned upon District Court approval by December 24, 1968, the District Court fixed a hearing on the offer for December 20, 1968; and directed that notice be sent to B.S.F. stockholders, to the prior offerors, and to certain other persons whose identities are not pertinent (38a-39a).

Petitioners objected to the short hearing date and sought a continuance on the ground that the Receiver had forced the Court to adopt an unconscionably rapid-fire sale procedure (42a-43a). Their motion was denied and the hearing took place on Friday, December 20, 1968, as scheduled (71a).

At the December 20, 1968 hearing the Receiver introduced some lay testimony as to why he thought Seagrave offer was adequate (95a-200a). However, there was no affirmative expert evidence of the value of the A.S.P. shares, and this perfunctory hearing did not constitute an independent financial appraisal of the shares (Appendix A, A-4). Since A.S.P. shares were traded over the counter in an admittedly thin[4] market, there was no ascertainable, reliable market value to be used as an objective measure

3. The first of the four offers at $16 per share, was made by Victor Muscat, a director of A.S.P., former director of B.S.F., and a defendant in the *Tanzer* litigation. Muscat could only be characterized as an insider (123a-124a). The Muscat offer was rejected.

4. The available floating supply of A.S.P. shares was approximately 180,000 shares. During the month between November 15, 1968, only 1017 shares were traded (353a-355a).

of value. Nor did a reliable market value result from the bidding, because adequate opportunity for competitive bidding was never developed. The notice to shareholders did not invite public bidding (40a). Only at the December 20, 1968 hearing, after objections were raised, did the District Court decide to receive further bids, and for that purpose, extended the hearing until the following Monday, December 23, 1968 (265a-269a). However, over the intervening weekend *no invitation for public bidding was ordered by the Court or announced by the Receiver.* When the hearing resumed on December 23, 1968 only one new bidder—Morgan Glickman—had appeared.[5]

The unexplained appearance of Morgan Glickman on December 23 injected the first bona fide competition into the proceeding and caused Seagrave to increase its bid from $20.25 to $24 per share (316a-318a). This dramatic indication of the as-yet undeveloped evidence of value of A.S.P. caused the objectors to renew their objection to the entire proceeding on the ground that a sale under these conditions would be precipitous (293a-295a; 311a-313a; 324a-325a). In overruling these objections, the District Court decided that a sale should take place on that very day (December 23rd) and ordered the submission of final bids by 4:00 P. M. (326a). Final bids were then submitted and the District Court ordered the sale to Morgan-Glickman, whose bid of $24.27 per share represented the highest unconditional offer made up to that point (332a-336a; 414a). No publication of the terms of the Morgan-Glickman sale, to invite higher bids, was ever ordered or had.

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5. In addition to Seagrave, Victor Metal Products Corp., an organization controlled by Victor Muscat, submitted a bid (209a-213a; 332a, 405a-413a). This bid was subject to certain conditions requiring approval by the Securities and Exchange Commission under the Investment Company Act of 1940, which impelled the District Court to reject the bid (213a-215a; 332a-333a).

In affirming, the Court of Appeals held that:

(1) The Federal Judicial Sales Act, 28 U. S. C. § 2004, gives a District Court discretion to dispense with the procedural requirements of § 2001 (i.e., appraisal and public notice), although those requirements should not be dispensed with except under extraordinary circumstances; and that

(2) the circumstances of this case justified the departure by the District Court from the § 2001 procedure. (Appendix A, A-4)

REASONS FOR GRANTING THE WRIT.

1. The court below has decided a novel and important question of federal law which has not been, but should be, decided by this Court. In upholding a private judicial sale of personalty in the custody of the District Court pendente lite, having no ascertainable market value, without prior appraisal or publication of the terms of sale, the Court of Appeals impliedly interpreted 28 U. S. C. § 2004 as conferring upon federal courts almost complete discretion to depart from the procedural requirements of 28 U. S. C. § 2001. While § 2004 contemplates some such discretion, the limits, if any, thereof have never been judicially defined. This first impression question of federal judicial procedure in the sale of personalty, the Petitioners respectfully submit, should be settled by this Court.

2. Furthermore, and apart from its novelty, the question presented is of importance in the administration of federal judicial sales. In a private judicial sale of realty, appraisal and publication of the terms of sale are conditions precedent to confirmation. 28 U. S. C. § 2001. These requirements safeguard against fraud or collusion, and are of such importance that to dispense with them has been held to deprive a court of jurisdiction to confirm the sale. *Acadia Land Co. v. Horuff,* 110 F. 2d 354 (5th Cir. 1940).

Where the private sale is of personalty, these requirements continue to apply "unless the court orders otherwise." Although Congress thus intended to permit some flexibility to depart from § 2001 procedure in private sales of personalty, it cannot be imagined that Congress thereby abrogated the policy inherent in § 2001 of safeguarding against fraud or collusion. The holding of the Court of Appeals undermines that Congressional policy. A proper interpretation of § 2004 would sanction departure from

§ 2001 procedures in private sales of personalty only so long as some objective criterion of valuing the property (such as market value) exists to measure the adequacy of private offers. However, the interpretation of § 2004 by the Court of Appeals, permitting a private sale absent any objective value criterion, places the owner of the property to be sold at the mercy of the buyer and removes all procedural safeguards against fraud and collusion. The instant private sale of corporate stock with no reliable market value, without any appraisal and without notice by publication of the terms of sale, is a disturbing case in point. The Court of Appeals recognized that "the lack of an independent financial appraisal justifying the price causes us some concern" (Appendix A, A-4).

To permit a receiver to make a contract without prior court approval and with a short, coercive deadline compelling a sale without due public notice is to deprive B.S.F. shareholders of their property without due process of law.

If the decision of the court below is allowed to stand, in effect granting federal courts unlimited discretion to set the procedure for private sales of personalty, then the integrity of federal judicial sales will be jeopardized. The extent of allowable departure from § 2001 requirements in private sales of personalty, particularly by a receiver pendente lite, is an issue which it is in the public interest for this Court to decide. That issue is likely to arise whenever personalty is to be sold at private judicial sale, especially in view of the total absence of decisional law on the subject.

3. Finally, the decision of the court below sanctions so far a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision over the

federal courts. As this Court observed in *Pewabic Mining Co. v. Mason,* 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732, 734:

> "It may be stated generally that there is a measure of discretion in a court of equity both as to the manner and the condition of a sale. . . . The Chancellor will always make such provisions for notice and conditions as will, in his judgment, best protect the rights of all interested and make the sale most profitable to all . . ."

The requirements of appraisal and public notice are consistent with the purposes of protecting the interests of interested parties and of obtaining the highest possible price. *Acadia Land Co. v. Horuff,* 110 F. 2d 354 (5th Cir. 1940); *Read v. Elliott,* 94 F. 2d 55 (4th Cir. 1938); *Reid v. King,* 157 F. 2d 868 (4th Cir. 1946); see *In Re Stanley Engineering Company,* 164 F. 2d 316 (3rd Cir. 1947). The omission of those requirements deprives owners of a procedure designed to yield the highest possible price for their interests, and amounts to an arbitrary deprivation of the property of B.S.F. and its shareholders without due process of law.

Whether and to what extent the judicial procedure utilized here is permissible should be determined by this Court, pursuant to its supervisory power, in the interest of a uniform construction of the standards to be followed by federal courts in private sales of personalty.

CONCLUSION.

For the reasons stated, the writ should be granted.

Respectfully submitted,

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Dated: July 31, 1969.

APPENDICES

APPENDIX A.

Opinion Delivered in the Court Below.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17738

DEBORAH TANZER

v.

ROBERT H. HUFFINES, JR., EDWARD KROCK, VICTOR MUSCAT, DEFIANCE INDUSTRIES, INC., AND B.S.F. COMPANY

DEFIANCE INDUSTRIES, INC., AND B.S.F. COMPANY,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued May 22, 1969

Before FREEDMAN, SEITZ and ALDISERT, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 10, 1969)

PER CURIAM.

Appellants were objectors below to an order of the district court authorizing the Receiver pendente lite to sell the controlling stock which the receivership corporation owned in another corporation. They assert here that the sale was unnecessary and, that in any event, the sale should be invalidated because the procedure adopted was fatally defective and grossly prejudicial to the stockholders. It is agreed that a pendente lite receiver may be authorized to sell assets of the receivership estate if the requisite showing is made. We turn briefly to the facts pertinent to the sale.

The receivership corporation has virtually no cash. It is also in default in its obligations to the extent of approximately $300,000. Nearly all of its assets have been pledged as collateral to secure its liabilities. Furthermore, in December of 1969, about $800,000 worth of its debentures will mature. More than ⅔ of the shares here in issue are pledged against such debentures. In these circumstances, it was incumbent upon the receiver to attempt to find a solution to the corporation's dire financial problems. To that end the Receiver investigated the possibility of a sale of the securities in question. The possibility that the stock might be available for purchase was well known in the financial community. Indeed, the first purchase offer at $16.00 per share came from defendant below, Victor Muscat, who controls appellants as well as the corporation whose stock was ordered sold by the district court. For a discussion of the role of Victor Muscat in these proceedings, see Tanzer v. Huffines, 282 F. Supp. 273 (D. Del. 1968), aff'd., 408 F.2d 42 (3rd Cir., 1969). The Receiver rejected the Muscat offer and later entered into a contract to sell the stock in question to the Seagrave Corporation at $20.25 per share. However, the agreement was made expressly con-

tingent upon approval by the district court on or before December 24, 1968. In view of the deadline, the Receiver requested accelerated approval of the Seagrave offer. By order dated December 10, 1968, the district court fixed a hearing on the offer for December 20, 1968, and directed that notice be given to the stockholders of the corporation as well as to all parties to the litigation and to others designated in the order. During the course of the December 20 hearing the district court made it known that it would welcome other bidders and continued the hearing until December 23, 1968. At the adjourned hearing it was decided that the property would be sold but that the parties could submit bids up to 4:00 p.m. on December 23. When the bids were received the court approved as the highest unconditional bid that of David Morgan and Carl Glickman amounting to somewhat over $24.00 per share. It is the order approving that sale which is now on appeal.

Appellants first contend that the sale was unnecessary because the corporation's debt structure could have been refinanced or other assets of the corporation could have been sold. We have reviewed the evidence pertinent to these contentions and we are entirely satisfied that the district court did not abuse its discretion in concluding that there was "a definite and pressing need for the sale of this stock." We cannot share the appellants' sanguine view as to the feasibility of other less drastic solutions to the company's financial crisis.

Appellants next contend that the procedure under which the sale was conducted requires its disapproval. Appellants rely primarily upon 28 U. S. C. § 2004, which incorporates § 2001 by reference. Those sections contemplate compliance with certain procedures designed to protect the best interest of the estate (e.g., a notice requirement) before a district court may order a sale such as the

one in question here, "unless the court orders otherwise." It is agreed that here the district court did order otherwise, and the issue is whether it was justified in so doing.

We think it is clear that the federal statute does express a preferential course to be followed in connection with a court authorized sale of property and that the district court should not order otherwise except under extraordinary circumstances. We nevertheless recognize that where, as here, the court does proceed apart from the statute the test is still one of whether there has been an abuse of discretion in the circumstances.

We think the district court was justified in expediting the hearing in this case primarily because of the financial condition of the corporation and the deadline fixed by the offeror. Moreover, the court, in order to insure that the receivership estate was getting full value, did use the additional time available to permit even higher offers. While the lack of an independent financial appraisal justifying the price causes us some concern, we believe the importance of such an appraisal in this case is outweighed by the other evidence tending to show that the best price under the circumstances was obtained for the stock. Indeed, the appellants do not articulate a formula which shows that the price received does not represent the fair value of the stock. This is particularly significant here since Victor Muscat was the dominant force in the corporation whose shares were being sold and thus was in a position to testify as to value. We cannot say, therefore, that the district court abused its discretion in authorizing the sale under the facts in this record.

The order of the district court authorizing the sale of the stock will be affirmed.

APPENDIX B.

Judgment Sought to Be Reviewed.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 17738.

DEBORAH TANZER

v.

ROBERT H. HUFFINES, JR., EDWARD KROCK, VICTOR MUSCAT, DEFIANCE INDUSTRIES, INC., AND B.S.F. COMPANY

DEFIANCE INDUSTRIES, INC., AND B.S.F. COMPANY,

Appellants.

(D. C. Civil Action No. 3166.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: FREEDMAN, SEITZ and ALDISERT, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed December 24, 1968, which authorized the sale of the stock, be, and the same is hereby affirmed, with costs.

ATTEST: THOMAS F. QUINN,
Clerk.

June 10, 1969

APPENDIX C.

Statutes Involved.

The following is the text of the pertinent provisions of the Federal Judicial Sales Act, 28 U.S.C. §§ 2001 and 2004:

Sec. 2001 [27 Stat. 741, as Amended by 48 Stat. 1119, 49 Stat. 159, 49 Stat. 390, 28 U.S.C. 2001].

"(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds

that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

(c) This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency."

* * *

Sec. 2004 [27 Stat. 751, as amended by 49 Stat. 160, 49 Stat. 390, 28 U.S.C. § 2004].

"Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise.

This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency."